STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 30, 2010
V LADRE HAYES, Defendant-Appellant.	No. 293104 Wayne Circuit Court LC No. 09-003121-FC

Before: MURPHY, C.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to concurrent terms of three to ten years for assault with intent to do great bodily harm less than murder and one to four years for felonious assault, and to a consecutive two-year term for felony-firearm.[1] We affirm but remand to correct an error in the judgment of sentence. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was jointly tried with Akeem Alfahili. The victim, Darie Mann, testified unequivocally that Alfahili was driving a vehicle from which defendant shot toward his vehicle, resulting in injuries to himself and his passenger. Mann said he knew defendant's given name to be "Dre", but he also knew him as "Little Dilley" and "Lil' Dre". Mann identified defendant as the shooter at trial and in a prior photographic lineup. However, a previous statement given to police appeared to identify Deandre Manley, who was also known as "Dre" and was also an occupant of the vehicle, as the shooter. .

At the time of the shooting, Alfahili was assigned a tether with a GPS tracking transmitter. While there was no direct evidence that Alfahili was actually wearing the tether,

[1] The judgment of sentence erroneously recorded the felony firearm sentence as being two months to two years. The statute imposes a mandatory two-year term for felony firearm. MCL 750.227b(1). The sentencing transcript indicates that a two-year term was contemplated. We therefore remand for correction of the judgment of sentence.

monitoring records showed that Alfahili was at his home from 8:01 p.m. to 9:25:44 p.m. However, at 9:29 p.m., he was approximately two blocks from the site of the shooting and was moving. Mann testified that the shooting occurred around 9:00 p.m., that he drove to his mother's house after the shooting, and that she called 9-1-1. It was stipulated that this call was made at 9:31 p.m. Police records showed that the police responded at 9:36 p.m.

Defendant first argues that he was denied the effective assistance of counsel because his attorney did not move for mandatory or discretionary severance of his trial from that of Alfahili. He suggests that in a separate trial he could have called Alfahili as a witness. He states that Alfahili could have confirmed that he was actually wearing his tether, a point the prosecutor questioned in closing rebuttal argument, and could have established that defendant was with him and not at the location of the crime during the relevant time period. Since defendant did not move for an evidentiary hearing, review is limited to mistakes apparent on the record. To the extent mistakes are not apparent, the issue must be deemed waived. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Ineffective assistance of counsel claims are governed by the following law:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). [*People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001)].

Additionally, it is well established that counsel need not bring a futile motion in order to be constitutionally effective. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

MCR 6.121(C) provides for severance of trials against defendants on related offenses when "necessary to avoid prejudice to substantial rights of the defendant." The court *may* sever pursuant to motion if "appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants." MCR 6.121(D).

Defendant and Alfahili posed the same defense, arguing that the times established by the GPS indicated that they could not have been involved in the shooting. Since the same operative facts were at issue and the defendants posed reconcilable defenses, it is unlikely that any motion

to sever would have been granted. On appeal, defendant's assertions regarding the potential content of Alfahili's testimony is purely speculative. Defendant asserts that Alfahili would have testified that he was wearing the tether and that he was with defendant when the shooting occurred. However, it is equally likely that Alfahili would have asserted that he was wearing the tether but denied that he was with the defendant on the night in question. Alfahili might well have chosen to distance himself from defendant since defendant had been identified as the shooter in this incident. However, by being tried together, defendant was able to take advantage of the inference, albeit one rejected by the jury, that neither defendant could have been present at the crime scene given the time frame established by the GPS monitoring system. Thus, deciding not to seek severance could have been a matter of trial strategy. In any event, defendant has not shown that severance was "necessary to avoid prejudice to substantial rights of the defendant" or that it was "appropriate to promote fairness to the parties and a fair determination of the guilt or innocence of one or more of the defendants." A motion to sever in this case would have been futile, and counsel was not required to bring a futile motion. *Ish*, 252 Mich App at 118-119.

Defendant next argues that he should have been granted a directed verdict, asserting that neither Mann nor the officer who conducted the photographic lineup ever definitively identified defendant as the shooter. In reviewing the denial of a motion for a directed verdict of acquittal, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Defendant's claim is belied by the record. Mann indicated that he knew defendant as "Little Dilley", "Dre" and "Little Dre." He unequivocally identified defendant at trial, distinguishing him from Alfahili at trial by indicating that he was wearing black pants. Moreover, the officer *did* say that Mann identified defendant in the photo lineup. Despite some confusion indicating that a reference to "Dre" might have been to Deandre Manley, the identifications themselves, when viewed in a light most favorable to the prosecution, would justify a rational trier of fact in finding that the evidence established the essential elements of the crime beyond a reasonable doubt.

Affirmed but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens